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Nos. 195, 196 and 197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA,
Petitioner,
against
BANK OF NEW YORK AND TRUST COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
against
PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
against
LOUIS H. PINK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Samuel E. Morro, et al., as Amici Curiae

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*BRIEF FOR SAMUEL E. MORRO, ET AL., AS AMICI CURIAE.**

Statement.

This brief is filed by the consent of all the parties to this appeal.

*References are all to the Record in No. 195, unless otherwise indicated.

Samuel E. Morro is a resident of the State of New York and a citizen of the United States and was such at all the material times herein mentioned and prior to the Soviet revolution in 1917. He is the owner of 220 shares in the Moscow Fire Insurance Company, whose New York funds the United States Government claims to have acquired by an assignment from the Soviet Government. As such stockholder in the stockholders' action tried in the State Courts of New York, he obtained a judgment for $15,400, the execution on which was stayed pending the determination of these suits.

George Brussendorff and approximately 100 additional claimants are holders of life policies in the First Russian Insurance Company, whose New York funds are being administered by the Superintendent of Insurance of the State of New York. All of these claimants are citizens of countries other than Soviet Union. All of these claimants are not residents of the Soviet Russia. Their claims were allowed and partially paid by the Superintendent of Insurance in the course of his administration of the New York assets of said First Russian Insurance Company. Additional dividends are due and payable from said funds upon the claims of these policyholders.

The Question Considered in This Brief.

Apart from the issue of jurisdiction, *the sole question involved upon this appeal is whether or not our courts should enforce the penal statutes of Soviet Russia.* No question at all of the public policy of the United States is concerned. However, if such question were concerned, the contentions in regard to the doctrines of public policy set forth in the Government's brief are both unsound and contrary to the authorities.

The Doctrines of Unenforcibility of Foreign Penal Statutes and of Foreign Laws Contravening Domestic Public Policy Are Not the Same.

While considerable confusion exists both in the minds of the text writers and the decisions of the courts in regard to the doctrines dealing with unenforcibility of foreign statutes as penal, and as against domestic public policy, the doctrines are thoroughly dissimilar.

The doctrine of public policy is a rule of domestic law and, as such, depends entirely upon the domestic law and varies with changes in domestic law as influenced by its public opinion. The doctrine of unenforcibility of foreign penal statutes is a rule of international law (*Huntington* v. *Attrill,* 146 U. S. 657, 680, 685) which does not depend upon domestic legislation or domestic policy, but as any other rule of international law, requires either a concensus of international states or an international treaty to change it. Moreover, a foreign penal statute, such as a tax statute, may not be against our public policy, yet it will not be enforced.

The basis of domestic public policy is the domestic legislation. The basis of the international rule against unenforcibility of foreign penal statute is the sovereign integrity of the state. To permit the enforcement of a foreign statute as contravening the domestic public policy of the forum may involve the change in this policy. To permit the enforcement of a foreign penal law would mean to yield the authority of the domestic sovereign and to extend extraterritorially the sovereignty of the foreign state. "It would be a manifest incongruity for one sovereign to punish a person for an offense committed against the laws of another sovereignty." (Bradley, J., in *Ex Parte Bridges,* 2 Woods, 428, 430, cited with approval in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, p. 272.)

The Penal Character of a Foreign Statute Is to Be Determined Solely By Our Courts.

This question was carefully considered by this Court and by the highest court of the British Empire, the Judicial Committee of the Privy Council, in the famous case of *Huntington* v. *Attrill* (1893), Appeal Cases 150, where the Court said at page 155:

> "Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the state where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in a position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

This Court adopted this view of the law in *Huntington* v. *Attrill,* 146 U. S. 657, 681.

What Statutes Are Penal.

The question what is a penal statute within the meaning of said international rule was likewise determined by this Court and the other highest courts in the English speaking jurisdictions.

In *Huntington* v. *Attrill,* 146 U. S. 657, this Court said at page 673:

> "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, *depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.*"

In *Huntington* v. *Attrill,* supra, the Judicial Committee of the Privy Council had adopted the rule laid down by this Court in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, saying at pages 155, 156 and 157:

> "The general law on this point has been correctly stated by Mr. Justice Story in his 'Conflict of Laws,' and by other text writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of someone representing the public, are local in this sense, that they are only cognizable and pun-

ishable in the country where they were committed. *Accordingly, no proceeding, even in a shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches of the lex fori, ought to be admitted in the Courts of any other country.* * * *

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin* v. *The Pelican Insurance Company*, 127 U. S. 265. By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporation carrying on business under it who failed to comply with one of its enactments.

The penalty was recoverable by the commissioner of insurance, an official entrusted with the administration of the Act in the public interest, one-half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the cost of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other state. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text books, and the dictum by Chief Justice Marshall already cited (*The Antelope*, 10 Wheat. 66, 123), went on to say:

> 'The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.*'

Their Lordships do not hesitate to accept that exposition of law, which, in their opinion, discloses

> the proper test for ascertaining whether an action is penal within the meaning of the rule. *A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law has been infringed.*"

This Court, in turn, adopted these statements as its own in *Huntington* v. *Attrill,* 146 U. S. 657, 682, 683.

In *Louks* v. *Standard Oil Co.,* 224 N. Y. 99, Mr. Justice Cardozo said, at pages 102 and 103:

> "The question is whether it is penal within the rules of private international law. *A statute penal in that sense is one that awards a penalty to the state,* or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong (*Huntington* v. *Attrill,* 146 U. S. 657, 668; *Huntington* v. *Attrill,* 1893 A. C. 150, 156; *Brady* v. *Daly,* 175 U. S. 148, 154, 157; *Raulin* v. *Fischer,* 1911 2 K. B. 93; *Dicey, Conflict of Laws,* p. 209). *The purpose must be,* not reparation to one aggrieved, but *vindication of the public justice* (*Huntington* v. *Attrill,* 146 U. S. 668; *Brady* v. *Daly,* supra)."

The above rule of international law applies equally to the enforcement of state laws by the Federal Courts and the state laws of several states by the courts of other states (*Huntington* v. *Attrill,* 146 U. S. 657, 671-673; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 291).

For this reason, we will cite indiscriminately decisions dealing with foreign and domestic state legislation, since they are governed by the same international rule.

Soviet Confiscatory Decrees Are Penal Law.

It is freely conceded in the bills in equity filed by the United States in the three above suits, that the title to the assets herein involved was acquired by the Soviet Government through the confiscatory decrees (p. 7).

These decrees themselves are set forth in the record and they provide in effect that the insurance in Russia is declared a state monopoly; that corporations doing insurance business in Russia are annulled, and that the assets of these corporations are expropriated by the state and made a part of the general funds of the Russian treasury (pp. 29-30). No compensation is provided either for the policyholders or the stockholders of said Russian corporation.

Whether said confiscatory acts of the Soviet Government will be deemed to provide for a special revenue, impost or a fine for the benefit of the state, in either case, the decrees in question clearly are penal in their operation and effect and provide for collection of a penalty without any offense on the part of the victims and solely for the benefit of the Russian state. It is immaterial whether the object of the penal statute is the increase in the public treasury of the state or the institution of a new public policy for furthering its public welfare.

In *Oklahoma* v. *Gulf, Colorado & Santa Fe Railway Co.*, 220 U. S. 290, this Court said at page 300:

> "Those principles must, in our opinion, determine the present case adversely to the State. Although the State does not ask for judgment against the defendant railroad company for the penalties prescribed by the Oklahoma statutes for violations of its provisions, yet *she seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a*

public policy touching a particular subject relating to the public welfare. The statute viewed as a whole is to be deemed a penal statute. *The present suit, although in form one of a civil nature, is, in its essential character, one to enforce by injunction regulations prescribed by a State for violations of one of its penal statutes* and is, therefore, one of which this court cannot take original cognizance at the instance of the State."

In *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, this Court said at page 299:

> "The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. Wisconsin Rev. Stat., sec. 1920. *The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one half into her treasury, and the other half to her insurance commissioner,* who pays all expenses of prosecuting for and collecting such forfeitures. Wisconsin Stat. 1885, C. 395."

The doctrine was applied in numerous cases.

The precise question herein involved was decided by this Court in *Baglin* v. *Cusinier Co.*, 221 U. S. 580. In that case, the question arose as to the effect of the confiscatory law of the recognized French Government passed in 1901 whereby the property of the catholic religious orders

was confiscated in France. The Order of Carthusian Monks since the Middle Ages produced and distributed throughout the world a liqueur known under the name of "Chartreuse." The Monks owned the trade marks on the Chartreuse in the United States. When the Monks were expelled from France, they moved to Tarragona, Spain, and there continued to manufacture the Chartreuse. The French liquidator also continued to manufacture what he claimed to be the Chartreuse at the original monastery, known as "La Grand Chartreuse," in France.

The French liquidator appointed Cusinier Co. as the distributors of the French Chartreuse in the United States, and Baglin, the procurator of the Order of Carthusian Monks, brought a suit against Cusinier Co., asking the United States courts to restrain Cusinier Co. from using the trade-marks and labels relating to the Chartreuse liqueur in the United States. Cusinier Co. insisted that by the French law the rights to the American trade-marks and labels on the Chartreuse passed to the French liquidation. Mr. Justice Hughes stated at page 591, that one of the questions which the Court had to decide was as follows:

> "On the merits, the questions presented are:
>
> (1) What rights, with respect to the designations and marks involved, were enjoyed by the Carthusian Monks prior to their expulsion from the French Monastery;
>
> (2) *What effect upon their rights had* (a) *the liquidation proceedings in France.* * * *"

And he answered it in behalf of this Court as follows at page 596:

> "We are not concerned with their authority under the French law to conduct the business, but it is not the business to which the trade-marks in this

country relate. That business is being conducted according to the ancient process by the Monks themselves. *The French law cannot be conceived to have any extraterritorial effect to detach the trade-marks in this country from the product of the Monks, which they are still manufacturing.*

The matter was put thus by Lord MacNaghten in the House of Lords, in *Lecouturier* v. *Rey* (1910) A. C. 262, page 265:

> 'To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market. *But it is certainly satisfactory to learn from the evidence of experts in French law that the Law of Associations is a penal law—a law of police and order—and is not considered to have any extraterritorial effect. It is also satisfactory to find that these legal experts confirm the conclusion which any lawyer could draw from a perusal of the French judgments in evidence in this case, that the sale by the liquidator of the property bought by the appellant company has not carried with it the English trade-marks, or established the claim of the appellant company to represent their manufacture as the manufacture of the Monks of La Grande Chartreuse, which most certainly it is not.'*"

In *Mills Novelty Co.* v. *Dupouy,* 203 Fed. 254, the Circuit Court of Appeals for the Seventh Circuit considered the suit to recover penalties paid in Venezuela pursuant to Venezuelan law. It said at pages 258 and 259:

"The issue of law, therefore, is narrowed, as we believe, to this inquiry: Do the ultimate facts so established of consignment and entry of the defendant's goods—namely, that they were shipped by and consigned to the defendant in care of the plaintiff, under notice to the plaintiff for entry at a Venezuelan port, and they were thus entered in violation (for any cause) of the law of that country, resulting in confiscation of the goods—create liability in personam against the defendant to reimburse the plaintiff for the amounts of fine and expenses incurred by the plaintiff in such unlawful transaction? * * *

The unlawful entry could not subject the consignor, who was not present, to personal liability therefor, its utmost liability being in rem (as imposed) for forfeiture of the goods; *and however the procedure against the plaintiff was either caused or intended, the ensuing fines and charges cannot be enforceble per se against the defendant in this country and jurisdiction. Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 281."

In *Second Russian Insurance Co.* v. *Miller,* 297 Fed. 404, it was urged upon the Circuit Court of Appeals for the Second Circuit, that a law passed by the Imperial Government of Russia, a recognized government, which dissolved a contract between a Russian corporation in Russia, and a German partnership, both of which were non-residents of the United States, should be recognized as binding on our courts. In rejecting this contention, the Court said at pages 406 and 411:

"But it is argued that the Russian ukase of October 29, 1916, as a matter of law, terminated the contract and therefore the right of H. Mitzenbacker, Jr., to commissions under its contract with the appellant. It is said that by the rules of comity, and

under the international law, our courts must give effect to the Russian ukase. *It is pointed out that our government and that of Russia occupied the diplomatic status of friendly nations, between which all the principles of comity are operative. The decree of a sovereignty is local, and cannot be extended beyond its territorial limits.* Sovereignty does not exist where it is not supreme. * * *

We conclude that the Russian ukase had no extra-territorial effect, and did not operate as a cancellation of the contract. The moneys in question are satisfactorily shown to be the property of an enemy, and therefore subject to seizure by the Alien Property Custodian."

In the recent case of *Banco de Vizcaya* v. *Don Alfonso* (1934), 151 Law Times Report, 499, where the English Court considered the effect of the confiscatory decrees of the Spanish Government purporting to confiscate the security of a Spanish bank held by it in its name in England since 1923, the Court said at pages 500 and 501:

"On the 13th May, 1931, a decree was enacted by the Presidency of the Provisional Government of the Spanish Republic, providing by Art. 1 for the seizure of all properties situate or placed in Spain which might belong to the private fortune of the defendant, and by Art. 3 that bankers established in Spain, who had in deposit such properties as were referred to in Art. 1, should make delivery thereof to the Spanish Treasury. On the 3d June, 1931, an order of the Spanish Ministry of Finance was made for the due execution of the decree of the 13th May, 1931, and on the 26th November, 1931, a decree was enacted by the Constituent Cortes of Spain declaring the defendant to be guilty of high treason and an outlaw, and that all the properties,

rights and grounds of action belonging to him which were situated within the national territory should be seized for its own benefit by the Spanish State. * * *

In such circumstances, the judgment of the Judicial Committee of the Privy Council in *Huntington* v. *Attrill* (1893), A. C. 150 at p. 155, lays down that I have to construe and apply an international rule, and to determine, first, the substance of the right sought to be enforced, and, in the second place, whether its enforcement will, directly or indirectly, involve the execution of a penal law of another state.

In my judgment, the substance of the right sought to be enforced by the plaintiffs is the delivery to them of the securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities to the Spanish Government in defiance of the mandate of the defendant, and, that being so, it seems to me unarguable that the enforcement of the plaintiffs' right will directly or indirectly involve the execution of the decrees. It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action; because they are not asserting the right of the Spanish Government but their own contractual right to the securities as against the Westminster Bank. I am unable to accept this contention.

The plaintiffs are not asserting their contractual rights as they originally existed but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but

the rights of the Spanish Republic. It is true, as is pointed out in *Huntington* v. *Attrill* (supra) that some actions for penalties are not penal actions within the meaning of the above mentioned international rule—where, for instance, the penalties are not exigible by the State in the interest of the community, but by private persons in their own interest. But in the present case the penalty imposed is seizure by the State for its own benefit of all the defendant's properties, rights, and grounds of action, and this penalty is imposed in terms for high treason, and the only way in which the plaintiffs are able to assert their claim that they are entitled as against the defendant is by virtue of these decrees, and they are compelled to admit that they have no personal right or title to the property in the securities. In the words of Lord Loughborough in *Folliott* v. *Ogden* (1 Hy. Bl. 123) at p. 135:

> 'The *penal laws of foreign countries* are strictly local, and *affect nothing more than they can reach and can be seized by virtue of their authority;* a fugitive who passes hither comes with all his transitory rights; *he may recover money held for his use, stock, obligations, and the like; and cannot be affected in this country by proceedings against him in that which he has left,* beyond the limits of which such proceedings do not extend.'

These words have frequently been cited with approval, and in my judgment, they are directly applicable to the present case. I, therefore, hold that H. M. Don Alfonso and not the plaintiff is entitled to the securities in question."

In *Manufacturing Co., etc.,* v. *Huth,* K. B. D. (1928), reported in British Year Book of International Law for 1930, at pages 235-237, Wright, J., held:

> "That the Soviet confiscatory decrees did not purport to, and in any case could not, have the effect of transferring the ownership of the bonds and balances of the plaintiff company in the hands of the defendants in England, since this property was not situated in the jurisdiction of the Soviet Government and such decrees could have no extra-territorial effect."

The French Court arrived at similar decision. The Court of Appeals of Paris in *Northern Russian Insurance Co.* v. *Union & Phenix Insurance Co.*, McNair (1927-8), No. 42, said at page 66:

> "But the recognition by the French Government of the government of the Russian Socialist Republic (October 28, 1924) does not make applicable in France the legislation in force in Russia since 1918, as it is against the general principles of French law and the public policy of France; and to sanction the principle of the Soviet decree of December 13, 1918, inasmuch as it abolishes without indemnity within Russian territory private property for the benefit of the State, would be to recognize a right of spoliation contrary to the principle of public policy of the inviolability of the right of property derived from Article 545 of the French Civil Code.
>
> *In addition, the Soviet Government has had to recognize in accordance with instructions given to its agents abroad, that the laws of nationalization of private property could not have anything but an exclusively territorial application and could not be extended beyond the Russian territory.*"

The international rule applies regardless of the location of property. It is claimed because of the operation of the doctrine "mobilia sequuntur personam," the title to the

property of the Russian corporations herein involved is to be governed by Russian law, which is to be recognized and enforced by our courts irrespective of the fact whether it is or it is not penal in its nature and effect. This assertion of the Government has no legal basis to support it.

In *Baglin* v. *Cusiner*, supra, the property in question was that of a French religious corporation located in France and naturally governed by French law. Both this Court and the English courts refused to apply to it confiscatory laws of France.

In *Second Russian Ins. Co.* v. *Miller*, supra, the contract was made in Russia by a Russian corporation then domiciled in Russia. Yet the Court refused to apply to it Russian Imperial law annulling its effect.

In *Banco de Vizcaya* v. *Don Alfonso*, supra, the securities in question stood in the name of a Spanish bank, located in Spain and governed by Spanish law. Yet, its suit for delivery of said securities was dismissed by the English court.

In *Manufacturing Co., etc.*, v. *Huth*, supra, the plaintiff company was a Russian concern with its main office in Russia, yet, the English court sustained, after the recognition of the Soviet Government by Great Britain, its claim to securities and money held by the defendant in England.

In *Republic of Peru* v. *Dreyfus Bros.*, 38 Chan. Div. 348, the confiscatory decrees of the Peruvian Government with regard to a contract made between it and Dreyfus Bros. in Peru and governed by the Peruvian law were refused recognition by the English courts.

Furthermore, it is immaterial for the purpose of applying the international rule herein discussed, under what guise the government attempts to collect its penalties. It may take the form of a tax (*State of Colorado* v. *Harbeck*,

232 N. Y. 71; *In re Visser* [1928], Chan. 877); an impost (*Moore* v. *Mitchell,* 30 Fed. [2nd] 600, 602; *Municipal Council* v. *Bull* [1909], 1 K. B. 7); a fine (*Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Mills Novelty Co.* v. *Dupouy,* 203 Fed. 254); a license fee (*Oklahoma* v. *Gulf, Colorado & Sante Fe Ry. Co.,* 220 U. S. 290); a custom duty (*Attorney General of Canada* v. *Schultze* [1901], 9 Scot. Law Times 4), or of an expropriation (*Banco de Viszcaya* v. *Don Alfonso* [1934], 151 Law Times Report 499; *Republic of Peru* v. *Dreyfus Bros.,* 38 Chan. Div. 348; *Wolf* v. *Oxholm,* 6 Maule & Selwyn 92, 99, 100, 106 [105 Eng. Repr. 1177]; *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.,* 251 N. Y. 243).

The rule applies whether foreign penal law is invoked to sustain a suit (*Wisconsin* v. *Pelican Ins. Co.; State of Colorado* v. *Harbeck; In re Visser; Banco de Viszcaya* v. *Don Alfonso,* supra), or to maintain a defense (*Attorney General of Canada* v. *Schultz; Wolf* v. *Oxholm; Manufacturing Co., etc.,* v. *Huth,* supra; *Folliott* v. *Ogden,* 1 Hy. Bl. 123, 135, 126 Eng. Repr. 75). The international rule will still protect our sovereignty from compelling it to enforce Soviet penal laws and thereby extend the sovereignty of the Soviet Government to the territory of the United States.

In other words, whether the alleged title of the Soviet Government to the funds in question is derived by it as a government, or as the confiscatory liquidator of Russian corporations, the result is the same. In either instance, what is sought is to enforce Soviet penal decrees. In either instance, our courts will not aid. The gravamen of the doctrine is not in the capacity in which the penal law is sought to be enforced, but in the penal nature of the foreign statutes themselves.

The International Rule Does Not Affect Our Diplomatic Relations With the Soviet Government

It is claimed by the Government, in its brief, that the application of this doctrine would result in the intermeddling of our courts with foreign relations of the United States. The doctrine had been known to English speaking jurisprudence since the decision of Lord Chancellor Eldon in *Barclay* v. *Russell*, 3 Vesey Jr. 424. Since the doctrine is a rule of international law, it must be deemed to have been known at all times to the Soviet Government. No government can complain or take offense to any rule of international law when applied to it. The Court should also assume that when our and the Soviet governments entered into the agreement in question on November 16, 1933, both were aware of the rule of international law herein discussed.

Moreover, the record conclusively shows that the Soviet officials by their own instructions to their subordinates have recognized this rule and confirmed their acquiescence in the same by stressing the fact that their penal confiscatory statutes were not applicable to non-Russian corporations or nationals, or to property, even of Russians, outside of Russia (Manhattan Company's Record, pp. 39-42).

Government's Authorities Are Not in Point.

Not a single case is cited by the Government in support of its proposition that our courts should enforce penal confiscatory laws of Soviet Russia. The cases upon which it does rely, *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, and *Underhill* v. *Hernandez*, 168 U. S. 250, do not have the slightest application to the facts herein involved.

In each of the said cases, this Court refused to sit in judgment over the *acts* of foreign governments consisting in physical seizure of property or spoliation of tangible property within its own territory. There was no question of enforcing foreign penal *law* in this country. In each case, a physical act of a foreign government done within its own territory was recognized as a fait accompli. In none of those cases, this Court was called upon to apply foreign law. In none of the above cases, this Court was called upon to confer a title to the assets in the United States by reason of foreign penal law.

On the contrary, in all of those cases, the Court was either asked to leave undisturbed the possession of tangible property actually sold by the foreign government in its own country and pursuant to the laws thereof or to punish an American concern for acts done at its instigation by foreign governments in its own country. In none of the above cases, was an attempt made to claim title to the property in the United States by an instrument made in the United States, the sources of which title were foreign penal and confiscatory laws.

In *Princess Paley* v. *Weisz* (1929), 1 K. B. 718, the English Court of Appeal applied to Russian property confiscated and sold by the Russian Government in Russia, the principle of the above American cases and, summarizing their legal effect, said at page 736:

> "This court will not inquire into the legality *of acts* done by a foreign Government against its own subjects *in respect to property situate in its own territory.*"

Government's Fallacies With Regard to the Doctrine of Public Policy.

1. *Public policy as a rule of law is not governed by an executive act.* The Government contends that the assignment as an executive act of the President determines the public policy of the United States. No executive act can ever determine any legal principle in the United States where the judicial and the executive branches of the government are distinct.

A legal principle may be affected in the United States either by statutes or by judicial decisions. It never can be established or destroyed by an act of the executive branch of the government. Public policy was defined in many ways but each of such definitions recognized it as a *legal* doctrine. The authorities are unanimous on this point. Public policy is "a rule of law" (*Oliver* v. *Wilder*, 27 Colo. App. 337; *Spaulding* v. *Maillet*, 57 Mont. 318; *Cahill* v. *Gilman*, 84 Misc. [N. Y.] 372; *Johnston* v. *Chicago Great Western Ry. Co.*, 164 S. W. 260, 262); "a legal principle" (*Fidelity & Deposit Co.* v. *Moore*, 3 Fed. [2nd] 652, 653; *State* v. *Gateway Mortuaries*, 87 Mont. 225; *Guggenheim* v. *Guggenheim*, 168 N. Y. S. 209, 212; *Maxfield* v. *Cincinnati D. & T. Traction Co.*, 111 Ohio St. 139; *Nashville Ry. & Light Co.* v. *Lawson*, 144 Tenn. 78; *American Nat. Ins. Co.* v. *Coates*, 112 Tex. 267); "public policy in relationship to administration of law" (*People* v. *Herrin*, 284 Ill. 368; *Master Builders Assn.* v. *Carson*, 132 Kan. 606; *Walsh* v. *Hubberd*, 122 Md. 168; *Driver* v. *Smith*, 89 N. J. Eq. 339; *Elzey* v. *Ajax Heating Co.*, 10 N. J. Misc. R. 281; *Le Masters* v. *Board of Education*, 105 W. Va. 81).

Furthermore, public policy is deducible only from the constitutional and statutory laws and judicial decisions (*Hagan* v. *Cone*, 21 Ga. App. 416; *Chaste* v. *Louisville Ry. Co.*, 167 Ky. 75; *N. Y. Life Ins. Co.* v. *Hamburger*, 174 Mich. 254; *In re Rahn's Estate*, 316 Mo. 492; *Spaulding* v.

Maillet, 57 Mont. 318; *Cruse* v. *Kischl,* 55 Mont. 258; *Matter of Lampson,* 161 N. Y. 571, 519; *Cahill* v. *Gilman,* 84 Misc. [N. Y.] 372; *Brown* v. *Am. Ry. Express Co.,* 128 S. C. 428; *Willys-Overland Co.* v. *Chapman,* 206 S. W. 978, 981).

To ascertain the public policy of the United States, the Court, in addition to the above, must take into account "the constitution, laws or treaties of the United States, or the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application." (*Hartford Fire Ins. Co.* v. *Chicago, Milwaukee, etc., Ry. Co.,* 175 U. S. 91, 100.) See also: *Federal Trade Comm.* v. *Paramount Famous Lasky Corp.,* 57 Fed. (2nd) 152, 154; *Southern Ry. Co.* v. *Blunt & Ward,* 155 Fed. 496, 497; *U. S.* v. *Trans-Missouri Freight Assn.,* 58 Fed. 58, 69; *Swan* v. *Swan,* 21 Fed. 299, 301.

Conversely, the courts are not at liberty to look into anything else, including the acts of the executive government to ascertain the public policy. Story, J., speaking for this Court in *Vidal* v. *Girard's Executors,* 2 How. 127, said at page 197:

> "Nor are we at liberty to look at general considerations of the supposed public interest and policy of Pennsylvania upon this subject, *beyond what its constitution and laws and judicial decisions make known to us.*"

And see on the same point: *People* v. *Hawkins,* 157 N. Y. 1, 12; *Weeks* v. *New York Life Ins. Co.,* 128 S. C. 223, 227; *Spead* v. *Tomlinson,* 73 N. H. 46, 58, 59.

2. *Government's executive acts themselves are subject to public policy rule.* The Government concedes in its brief that the Soviet assignment is not a treaty, but contends that because it is an act of its executive branch, it is not to be tested by the doctrine of public policy which merely

applies to private persons and not to the executive branch of the Government. While the suggestion may be ingenious, it is thoroughly refuted by decisions.

In *Andrew* v. *Bacon*, 208 Iowa 385, the Superintendent of Banks, by a contract with a director of an insolvent bank, agreed to allow it to operate upon the guarantee of the directors to keep the bank solvent. The Court, in holding the agreement invalid, said at page 390:

> "Manifestly, such an agreement tended to lead the superintendent away from his official duty and start him upon a voyage uncharted by, and contrary to, the statutes. Thereby the superintendent was induced to abandon 'the discharge of an official duty.' *Public policy clearly prevents that illegal course.* *Cole* v. *Parker*, 8 Iowa (Clarke) 167; *Cass County* v. *Beek & Co.*, 76 Iowa 487; *Dodson* v. *McCurnin*, 178 Iowa 1211."

In *Arms & Short* v. *Denton*, 212 Ky. 43, the Court said at page 47:

> "There is no escape from the conclusion that the statute was intended to prevent any officer of a city from entering into a contract for the benefit of himself as an individual with the city. Appellant Arms, a member of the partnership of Arms & Short, entered into a contract with the city from which he no doubt expected to make a profit while he was marshal of the city, a public officer of that municipality. *This was clearly against public policy* * * *."

In *State* v. *Bowman*, 184 Mo. Ap. 549, the City Council appointed one of its members the City Clerk. In holding the appointment void, the Court said at pages 552 and 553:

> "The defendant contends, and in this we agree

> as did the learned trial judge, that, granting that power and duty to select a city Clerk is vested in the city council, then such council could not select and appoint one of its own number to that office. *This is true because such exercise of the affirmative power is against public policy.*"

In *Parker* v. *The Trustees,* 96 Ohio St. 29, the Public Board engaged a lawyer at a fixed remuneration and reserved to itself a power to increase it. In holding that the contract was unenforcible, the Court said at page 33:

> "*We think that sound public policy forbids that public officials* should be permitted to definitely fix a certain sum to be paid for services to be rendered to the public, and at the same time reserve to themselves the arbitrary power to add to the sum named in the contract after the services are rendered."

3. *The executive branch of our government is not the sovereign establishing our public policy.* While it is true that the public policy is established by the sovereign, the Government is in error in alleging that the executive branch of the Government is that sovereign.

In our constitutional scheme the sovereign is the people (*Kennett* v. *Chambers,* 14 How. 38, 49; *Filbin Corp.* v. *U. S.,* 266 Fed. 911, 914; *Kennebec Water Dist.* v. *Waterville,* 96 Me. 234, 242) and the will of the people in defining its public policy is not manifested by any acts or utterances of the executive branch of the government, but solely through those of the legislative branch (*Chicago, etc., Ry. Co.* v. *McGuire,* 219 U. S. 549, 565; *Johnson* v. *U. S.,* 163 Fed. 30, 32 [Holmes, J.]; *Strauss & Co.* v. *Canadian Pac. Ry. Co.,* 254 N. Y. 407, 413, 414; *Kennebec Water Dist.* v. *Waterville,* supra; *Borgnis* v. *Falk Co.,* 147 Wisc. 327, 351).

It is well settled that, in acquiring property, the government takes title as if it were a private individual. It has no special privileges whatsoever. The same rule of law governs acquisition of property by a private person as that by the government. "The truth is, that when the government becomes the purchaser of property, it takes the title subject to the same rules as those which regulate the transfer of it to private persons." (*Briggs* v. *A Light Boat,* 7 Allen [Mass.] 287, 297.) When it acquires a property, it takes it subject to all such incumbrances thereon or claims against it as existed against the grantor thereof (*U. S.* v. *Perkins,* 163 U. S. 625, 630; *The St. Jago de Cuba,* 9 Wheat. 409, 416, 417; *Briggs* v. *A Light Boat,* supra).*

If the Government claims that it acquired title here from the Soviet Government as a corporate liquidator, then the assignment is certainly invalid because the liquidator's title will carry with it the duties of the liquidator or receiver of private corporations (*Lafayette Trust Co.* v. *Beggs,* 213 N. Y. 280, 283; *Matter of Silkman,* 121 A. D. [N. Y.] 202). The Government cannot accept property for any purposes other than governmental (*Federal Constitution,* Art. 1, Sec. 8, Cl. 1; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158; *U. S.* v. *Alex Dassel Iron Works,* 31 Fed. [2nd], 535, 537). Certainly the winding up of foreign private corporations does not savor of any governmental function of the United States.

4. *Confiscation of property is not part of our public policy.* The utmost effect of international comity is to make a foreign statute equivalent to a domestic statute. Our courts naturally cannot give to a foreign statute greater effect than to the command of the domestic sov-

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*"The United States cannot convert to itself the property of another, by its own declaration, or its own authority; * * *" (U. S. v. Union Pac. R. Co., 28 Fed. Cas. [No. 16,598], 333, 336, affd. 98 U. S. 569).

ereign.* In *Kolbin & Sons* v. *Kinnear & Co.* (1930), Session Cases (Scot.) 724, Lord Alness said at page 738;

> "* * * I think the answer is that the Soviet Government has been recognized by Great Britain, both de facto and de jure, as the Government of Russia; that the recognition dates back, in accordance with authority, to the foundation of the Republic in 1917; and that this decree, therefore, is *entitled to the same respect as a statute of the United Kingdom.*"

The United States is not a full fledged sovereign (*Hodges* v. *U. S.*, 203 U. S. 1; *Filbin* v. *U. S.*, 266 Fed. 911, 914). It is a government of delegated powers (*In re Quarles*, 158 U. S. 532; *Logan* v. *U. S.*, 144 U. S. 263; *Chae Chan Ping* v. *U. S.*, 130 U. S. 581). The property here involved is in the United States and is protected by the Federal Constitution, notwithstanding the fact that it belongs to aliens (*Truax* v. *Raich*, 239 U. S. 233, 239; *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 695; *Wong Wing* v. *U. S.*, 163 U. S. 228, 242; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369).

Even if the confiscatory title here claimed by the Government arose out of a formal treaty and not from a mere executive agreement, "It would not be contended that it extends so far as to authorize what the Constitution forbids * * *" (*Geoffroy* v. *Riggs*, 133 U. S. 258, 267). And see *The Cherokee Tobacco*, 11 Wall. 616, 620-1. Our Government could not pass a law confiscating private property without compensation and sustain that confiscation in our courts (Fifth Amendment to the Federal Constitution). In fact, no statute contrary to our public law could be enforced by our courts. (*Bank of New York* v. *Owens*, 2

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*Compare similar principle in regard to rights of aliens in the United States under treaties which are never permitted to exceed those of our citizens (Todock v. Union State Bank, 281 U. S. 449, 454; La Republic Francaise v. Saratoga Vichy Spring Co., 191 U. S. 427, 439).

Pet. 527, 539.) If our own statute could not be sustained if it provided for confiscation of property located in the United States, we are at a loss to understand how that result may be achieved by reliance upon a foreign statute, particularly when this Court expressly held that Soviet confiscatory policy is adverse to our jurisprudence and the policy of our people.

In *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, Chief Justice Hughes, speaking of the confiscatory acts of the Soviet Government in Russia, said at pages 491 and 492:

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. *The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments.*"

In *Worthen Co.* v. *Thomas,* 292 U. S. 426, 433, as further elucidating the public policy of this country, this Court, speaking of the police power of the State, said that it did not "permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

Dated, New York, December 16th, 1935.

Respectfully submitted,

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